

**IN THE MAGISTRATES' COURT**  
**AT BA**  
**CRIMINAL JURISDICTION**

*Criminal Case No. 612/2020*

**BETWEEN:**     **STATE**

**PROSECUTION**

**AND:**           **MOHAMMED TABARAKH**

**ACCUSED**

**Counsel:**                     WPC 5006 Maryan Ratucove for Police Prosecution  
                                      Accused not present and unrepresented.

**Date of Trial:**               4 October 2024

**Date of Judgment:**       23 December 2024

**JUDGMENT**  
**[TRIAL IN ABSENTIA]**

Introduction

1. Mr. Mohammed Tabarakh ("the Accused") was charged with 1 count of Grievous Harm contrary to section 258 of the Crimes Act 2009. The particulars of the offences are:

Statement of Offence

**Grievous Harm:** *Contrary to Section 258 of the Crimes Act No. 44 of 2009.*

Particulars of Offence

***Mohammed Tabarakh*** on the 1<sup>st</sup> day of November 2020 at Varavu, Ba in the Western Division unlawfully and maliciously did grievous harm to ***Nitesh Nischal***.

2. The Accused was produced for this matter on 3 November 2020. As this matter was an indictable offence triable summarily on the same date the Accused elected the Magistrates' Court to hear the matter. The Accused was also bailed on the same date.
3. The Accused pleaded Not Guilty to the charge on 22 January 2021 and thereafter he failed to appear. On 20 January 2022, the Court was informed that the Accused had travelled overseas for surgery without seeking leave of the Court as such a Bench Warrant was issued.
4. On 27 October 2022, Prosecution provided the Court with the Accused's Travel History from the Department of Immigration, which showed that the Accused had left for Brisbane, Australia on 3 December 2021 and had not returned into the country. Given this, this Court's first predecessor ordered that the matter proceed to Trial in Absentia as it was taken as the Accused had waived his right to be present for Trial.
5. After various adjournment, the matter was listed for Trial on 4 October 2024 and on the said date pursuant to section 171(1) of the Criminal Procedure Act, this Court decided to proceed with the Trial as if the Accused were present given that the Accused had notice of this matter and was aware to always be present and appear for his matter as per his Bail Undertaking Form signed on 3 November 2020. Further, despite being aware of these

proceedings and undertaking to appear, the Accused's absence in the matter from 20 January 2022 is deliberate. Subsequently, Trial in absentia proceeded before this Court.

6. Prosecution called 5 witnesses and thereafter closed its case. The Court found that there was a case to answer. As the Accused was unrepresented and not present, the matter was adjourned for Judgment.
7. It is important to note that the Accused's absence from this Trial has not been taken negatively. It is the Court's overriding duty to ensure that a hearing conducted in the absence of the Accused is conducted as fair as circumstances permit to lead to a just conclusion and the Court should not deviate from the applicable procedures and principles of conducting a fair and just hearing in the absence of an accused (vide *Kumar v State*; *Criminal Case: HAA 34 of 2015 (15 December 2015)*).

#### Burden of Proof

8. It is imperative to highlight that as a matter of law, the onus or burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no burden on an accused to prove his or her innocence as an accused is presumed to be innocent until proven guilty.
9. It is for the prosecution to prove the accused's guilt beyond a reasonable doubt. If there is doubt, so that the court is not sure of the accused's guilt, or if there be any hesitation in the court's mind on any of the ingredients or on the evidence led by prosecution, the accused must be found not guilty of the charges and accordingly acquitted.

#### Summary of Evidence

10. It is expected that to arrive at a proper conclusion, the matter ought to be considered in its logical progression with formulated reasons for the ultimate conclusion with the general rule being that a judgment should set out the relevant events and the material evidence in the correct sequence in narrative form with the identifying number of each pertinent witness being incorporated at the appropriate places – vide *Pal v R* [1974] 20 FLR 1 (17 January 1974) as referred to in *Wang v State* *Criminal Petition No. CAV 0013 of 2021 (26 October 2023)* and *State v Wang* *Criminal Appeal No. HAA 30 of 2019 (19 February 2021)*. As such, the Court will consider the logical progression of the relevant event with the material evidence in the correct sequence in narrative form with the pertinent witnesses being incorporated.
11. The Complainant – Nitesh Nichal testified that on 1 November 2020 at about 10am that the Accused attacked him with a chopper by striking the chopper on his left shoulder, once across his face and once on his chest. The Complainant then testified that the chopper only landed once on his body whereas the other 2 strikes, he was able to save himself. The Complainant then managed to pick a stone and upon Mohammed Tabarakh seeing his, the Complainant stated that he surrendered; turned around and went away towards his house. This was also confirmed by Dharmen Singh and Elik Penisemani.
12. As the Accused was not present and not represented, there was no cross-examination on his behalf. The Court will consider the evidence of the witnesses separately and collectively and ensure that all due consideration will be provided to ensure that the Accused is afforded a fair trial in his absence.



## Evaluation of Evidence

13. The Court will need to evaluate the evidence by Prosecution to determine the testimonial trustworthiness of the evidence which will be done by evaluating the credibility – the correctness or veracity of the evidence and the reliability of evidence – the accuracy of the evidence - vide **State v Prasad** Criminal Case No. HAC 72 of 2021 (20 June 2024). In doing this, the Court should consider the promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in Court and the evidence of corroboration where it is relevant. (vide **State v Moroci** Criminal Case No. HAC 161 of 2023 (26 April 2024)).
14. For a proper analysis of the evidence for the offence of Grievous Harm, it is imperative for the Court to turn its mind to the elements of the offending, which are:
- i. the accused
  - ii. unlawfully and maliciously
  - iii. causes grievous harm to another person.
15. With respect to the issue of identity, the Court of Appeal in **Uluibau v State**; Criminal Appeal No. AAU 0099 of 2016 (28 September 2023) succinctly discussed the difference of recognition and identification evidence. It stated:

*[12] There is a difference between recognition and identification evidence. The difference was described by Buss JA in **Mills v The State of Western Australia** [2008] WASCA 219*

*In general, identification evidence describes the evidence of a witness who identifies an accused as the offender in circumstances where the witness first saw the accused at or near the crime scene. In general, recognition evidence describes the evidence of a witness who recognises an accused as the offender in circumstances where the accused was previously known to the witness or had previously been seen by the witness other than at or near the crime scene. Where the witness's previous knowledge of the accused was tenuous, or the witness's previous sighting of the accused was fleeting, the witness's evidence that he or she recognised the accused at or near the crime scene may, in substance, resemble 'identification evidence'. The nature and character of the witness's previous connection with the accused is the crucial issue, rather than the characterisation of his or her evidence as 'recognition' evidence.*

*[13] The High Court of Australia in **Domican v The Queen** [1992] HCA13; 173 CLR 189, the so-called **Domican** warning derived from the following observations made by Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ*

*Whatever the defence and however the case is conducted, where evidence as to identification represents any significant part of the proof of guilt of an offence, the judge must warn the jury as to the dangers of convicting on such evidence where its reliability is disputed. The terms of the warning need not follow any particular formula. But it must be cogent and effective. It must be appropriate to the circumstances of the case. Consequently, the jury must be instructed 'as to the factors which may affect the consideration of [the identification] evidence in the circumstances of the particular case'. A warning in general terms is insufficient. The attention of the jury 'should be drawn to any weaknesses in the identification evidence'. Reference to counsel's arguments is insufficient. The jury must have the benefit of a direction which has the authority of the judge's office behind it. It follows that the trial judge should isolate and identify for the benefit of the jury any matter of significance which may reasonably be regarded as undermining the reliability of the identification evidence. (Domican Warning)*



*A **Dominican** warning is mandated for cases involving identification. It is not mandated for cases involving recognition. This is because, generally speaking, recognition evidence is more reliable than a stranger's evidence of identification. Nevertheless, ordinarily in cases involving recognition, a jury is reminded that mistakes in recognition, even of close relatives or friends, are sometimes made.*

*[14] This court accepts that the above principles of law defining the parameters of identification evidence from recognition evidence, equally applies in Fiji.*

16. Considering the discussion in Uluibau [supra] the Court will now consider the evidence in the matter herein, the Complainant in his evidence stated that the person that struck him with the chopper on 1 November 2020 was Mohammed Tabarakh and that their homes were facing each other and that he would recognize Mohammed Tabarakh if he saw him as Mohammed Tabarakh had been living in his area for 3 months. When shown a photograph, the Complainant confirmed that the photograph was of Mohammed Tabarakh. This photograph was marked as 'MFI 1'.
17. Prosecution's second witness, Dharmen testified that Mohammed Tabarakh was his neighbour and that he knew Mohammed Tabarakh for almost a year. Eliko, who was the third witness for Prosecution testified that he knew Tabarakh as his – Eliko's wife is Muslim and she is related to Tabarakh. When Dharmen and Eliko were shown the photograph marked as 'MFI 1', they both confirmed that it was Mohammed Tabarakh. 'MFI 1' was tendered as 'PEX3B' by Cpl Sikeli, who was the Police Officer who had arrested, interviewed and then charged Mohammed Tabarakh. Alongside the photograph, Cpl Sikeli also tendered the Accused Identification Details sheet as 'PEX3A' which was the ID of Mohammed Tabarakh - the same person he arrested in this matter.
18. It is apparent that the evidence of the Complainant and Dharmen with respect to the person who attacked the Complainant is based on recognition as the Complainant and Mohammed Tabarakh had been living in the same area for 3 months whilst Dharmen and Mohammed Tabarakh had been neighbours for 1 year. With respect to Eliko's evidence, it is also based on recognition as Eliko's wife is related to Mohammed Tabarakh. Further, the photograph which was marked as 'MFI 1' and then tendered as 'PEX3B', as confirmed by the Complainant, Dharmen and Eliko relates to the person whom they testified about as being the person who attacked the Complainant. Thus, the Court finds that the evidence of the Complainant, Dharmen and Eliko regarding the identity of the Accused, Mohammed Tabarakh is credible and reliable.
19. Regarding the issue of element of unlawfully and malicious, although there have been no definitions provided in law, the general meaning of unlawfully means without lawful reason whilst the meaning of maliciously as per the English Dictionary is '*intending or intended to do harm*'.
20. Thus, the Court will need to determine whether the Accused had unlawfully and maliciously caused grievous harm to the Complainant.
21. The Complainant testified that the Accused had been shouting at him and coming towards him and when the Accused was standing in front of the Complainant that is when he attacked the Complainant with a chopper by striking the chopper on his left shoulder, once across his face and once on his chest. However, as the Complainant was able to save himself from 2 strikes, the chopper only landed once on his body.
22. Dharmen also testified that he saw the Accused holding a chopper behind his back and going towards the Complainant. Dharmen stated that Accused was holding the chopper in his right hand and struck the Complainant on his left shoulder and that the first strike landed

on the Complainant's shoulder. This was also confirmed by Eliko who testified that the Accused had struck the Complainant on his left shoulder.

23. Further, Prosecution relies on the evidence of Dr. Kajal, who tendered the Complainant's Medical Form dated 1 November 2020 as 'PEX1'. Dr. Komal Andrews was the Doctor who had conducted the examination of the Complainant but given her non-availability, Dr. Kajal gave evidence on the medical examination conducted by Dr. Andrews. The law permits that in the absence of the Doctor who conducted the examination, another Doctor or a substitute Doctor can give evidence in Court based on the examination and the report prepared by the original Doctor (see section 133(5) of the Criminal Procedure Act 2009).
24. Dr. Kajal testified that the Complainant examined on 1 November 2020 at 11am and as per the Medical Form, Dr. Andrew's specific medical findings were:
- i. No jaundice
  - ii. Clear lung fields
  - iii. Abdomen soft – not tender
  - iv. Regular pulse
  - v. 4cm cut noted on left shoulder which was superficial and no active bleeds.
25. Dr. Kajal further testified that Dr. Andrew's professional opinion was that a 4cm superficial cut noted on left shoulder. Dr. Kajal testified that such an injury could have been caused from anything sharp.
26. The Court is mindful of the definition of grievous harm as defined in section 4(1) of the Crimes Act 2009 which states:

*"grievous harm" means any harm which*

- a. *amounts to a maim or dangerous harm; or*
- b. *seriously or permanently injures health or which is likely so to injure health or*
- c. *extends to permanent disfigurement, or to any permanent serious injury to any external or internal organ, member or sense.*

27. Whilst the Court finds that the Complainant's evidence is credible and reliable about being assaulted, the evidence of Dr. Kajal regarding the harm suffered by the Complainant does not fall with the definition of grievous harm as per section 4(1) of the Crimes Act 2009 as mentioned above. Rather, the Complainant received a superficial 4cm cut on his left shoulder.
28. Thus, the Court finds that Prosecution has failed to prove beyond reasonable doubt that the Accused had unlawfully and maliciously caused grievous harm to the Complainant on 1 November 2020.
29. However, section 160 of the Criminal Procedure Act 2009 allows the court to convict a person for a minor offence under certain circumstances. Section 160 states:

*Conviction of minor offences included in offence charged*

*160(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, the person may be convicted of the minor offence although he or she was not charged with it.*



*(2) When a person is charged with an offence and facts are proved which reduces it to a minor offence, the person maybe convicted of the minor offence although he or she was not charged with it,*

30. Thus, being guided by section 160 of the Criminal Procedure Act, I turn my mind to the evidence of Prosecution, the Complainant stated that the Accused had attacked him with a chopper which had struck him once on the left shoulder. As per the Medical Form tendered as 'PEX1', the professional opinion of the Doctor was that there was a superficial 4cm cut on the Complainant's left shoulder which as per Dr. Kajal could have been caused from anything sharp.
31. I, thus, find that the evidence elicited by the Prosecution has revealed a lesser offence of Assault causing Actual Bodily Harm.

**Determination**

32. I find that Prosecution has not discharged its burden in proving all the elements for Grievous Harm beyond reasonable doubt and therefore find the Accused, Mohammed Tabarakh, not guilty of Grievous Harm and acquit forthwith.
33. However, I find that Prosecution has discharged its burden in proving the lesser offence of Assault causing Actual Bodily Harm beyond reasonable doubt and I, therefore, find the Accused, Mohammed Tabarakh, guilty for Assault causing Actual Bodily Harm.



N. Mishra  
Resident Magistrate